SUPREME COURT, U.S.
JOHN T. FEY, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 576

ERCOLE LEONARDO AND ELSIE IRENE LEONARDO,
*Petitioners,*

VS.

BOARD OF COUNTY COMMISSIONERS OF ST. MARY'S COUNTY, MARYLAND, A BODY CORPORATE AND POLITIC, AND CONSTITUTING THE DISTRICT COUNCIL FOR "TALL TIMBERS-ON-THE-POTOMAC DISTRICT", A SEPARATE TAXING AND ASSESSMENT DISTRICT, ST. MARY'S COUNTY, MARYLAND, AND J. FRANK BAILEY, TREASURER FOR ST. MARY'S COUNTY, MARYLAND,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

## BRIEF FOR RESPONDENTS IN OPPOSITION

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## BRIEF FOR RESPONDENTS IN OPPOSITION

Items (a), (b) and (c) of Paragraph 1 of Rule 40 of this Court are not included in this brief, the Respondents being satisfied with the presentation of these items by the Petitioners.

## QUESTIONS PRESENTED

Petitioners in their framing of the questions presented by their petition make a misstatement of fact in paragraph 1 (Pet. 5) when they refer to Laws of Maryland 1950, c. 66, as being unconstitutional. The General Assembly of Maryland first made provision by said Act for the creation of Taxing and Assessment Districts for erosion prevention works and for the powers and duties of such Districts. Subsequently, decisions of the Court of Appeals of Maryland in *Funk v. Mullan Contracting Co.*, 197 Md. 192, 79 A. 2d 152 (1951) and *Washington Suburban Sanitary Commission v. Buckley*, 197 Md. 203, 78 A. 2d 638 (1951) made it appear probable that the subject matter of Laws of Maryland 1950, c. 66, should not have been considered at the thirty-day legislative session of the General Assembly in 1950 as being in violation of Section 15 of Article III of the Constitution of Maryland. That Section provides, in part, that at the 30 day session in even years, the General Assembly shall consider no bills other than (1) bills having to do with budgetary, revenue and financial matters of the State Government, (2) legislation dealing with an acute emergency, and (3) legislation in the general public welfare.

The General Assembly took note of the probable constitutional deficiency at its next regular session following publication of the above-cited cases and enacted Laws of Maryland 1953, c. 277, validating and confirming any action taken or any things done by any Board of County Commissioners purporting to act under the authority of the Laws of Maryland 1950, c. 66. Laws of Maryland 1953, c. 277, then provided for the creation of Taxing and Assessment Districts for erosion prevention works and for the powers and duties of these Districts. However, Laws of Maryland

1950, c. 66, has never been declared unconstitutional, and the court below specifically stated that it was unnecessary to pass on the constitutionality of the 1950 Act (Pet. 24).

Respondents submit that there are only the three following questions involved in this case and that they have been answered previously by decisions of this Court and other courts:

1. Is there a denial of due process under the 14th Amendment of the Constitution of the United States when a State Legislature ratifies by subsequent legislation an ultra vires act of a political sub-division, which act the Legislature could originally have authorized, and such ratification disturbs no vested rights?

2. Is there any denial of due process when County Commissioners, pursuant to legislative authority, exercise their discretion in dividing the cost of a public improvement, including interest on indebtedness incurred for such improvement, between an ad valorem tax upon all property within the taxing district and a special benefit assessment on property specially benefited, where no charge of arbitrary or capricious action by the County Commissioners has been made?

3. Is there any denial of equal protection of the law under the 14th Amendment of the Constitution of the United States where County Commissioners, in the exercise of discretion conferred upon them by the State Legislature, define a district to be benefited by a public improvement so as to include therein property which is enclosed by the taxing district boundaries and is already so improved, while excluding from the taxing district property on the periphery thereof and already having such improvement?

## STATEMENT OF THE CASE

The facts which led to this present litigation are well set forth in the opinion of the lower court (Pet. 17-21). The Court of Appeals of Maryland decided that Petitioners, who are owners of Lots Nos. 43 and 44 in the erosion prevention district of "Tall Timbers on the Potomac" (Ex. 4, Record Extract 55-56), should not be required to pay the benefit charge fixed and levied on their lots so long as the taxing authority had not acquired ownership of or an easement in Petitioners' privately owned seawall in front of the said lots, but that Petitioners were liable for the payment of the ad valorem tax duly assessed pursuant to the authority of Laws of Maryland 1953, c. 277 (Annotated Code of Maryland, 1957 Cum. Supp., Art. 25, Secs. 156-162). Lots Nos. 43 and 44 face the Potomac River and are bounded on the other three sides by lots in the Tall Timbers on the Potomac District.

## ARGUMENT

I. Petitioners argue that the General Assembly of Maryland in enacting Laws of Maryland 1953, c. 277, was without authority to ratify and confirm action taken pursuant to provisions of the Laws of 1950, c. 66. Between the passage of the two Acts a substantial portion of the construction at Tall Timbers on the Potomac had been completed, although bonds had not been issued nor taxes and benefit charges levied (Pet. 24).

It has long been held in Maryland that, unless there is a disturbance of, or interference with, vested rights, the legislature possesses the power to pass a retroactive law to make valid an ultra vires municipal contract, if the contract is one which the legislature might originally have authorized. *O'Brian v. County Commissioners*, 51 Md. 15 (1879). See also *C. and P. Tel. Co. v. Balto. City*, 89 Md. 689, 714,

44 A. 1033 (1899); *Water Co. v. Havre de Grace*, 150 Md. 241, 253, 132 A. 768 (1926).

The *O'Brian* case followed the decision in *Thomson v. Lee County*, 3 Wall. 327 (1865) which has been consistently followed. *Anderson v. Santa Anna*, 116 U. S. 356, 6 S. Ct. 413, 29 L. Ed. 633 (1886); *Bolles v. Brimfield*, 120 U. S. 759, 7 S. Ct. 736, 30 L. Ed. 786 (1887); *City of Allegany v. Consumers' Power Co.* (C. A. 6, 1934), 71 F. (2d) 477, cert. denied 293 U. S. 586, 55 S. Ct. 100, 79 L. Ed. 681. This doctrine is clearly correct and there is no need for review by this Court.

II. Petitioners next contend through several questions that the levy of an ad valorem tax against their lots is improper because no benefits are conferred on their lots by the erosion prevention works constructed by the County Commissioners, and that there is a violation of the due process clause of the 14th Amendment of the Constitution of the United States because a portion of the ad valorem tax includes interest payable on the issue of bonds sold to pay for the erosion prevention works.

Petitioners' argument fails to distinguish between the nature of a benefit assessment and that of an ad valorem tax. Laws of Maryland 1953, c. 277, provided for (a) a benefit charge on the properties benefited; (b) an annual tax on all the assessable property in the taxing district, and (c) if necessary, a county-wide ad valorem tax. There is nothing unusual in this procedure, it having been approved by the Court of Appeals of Maryland in *Dinneen v. Rider*, 152 Md. 343, 136 A. 754 (1927), where it was pointed out that the benefit assessment rests upon the theory of benefit and is substantially different in kind from the ad valorem taxes imposed throughout the district or throughout the County.

The court below has quite properly ruled that Petitioners are not required to pay the benefit charge fixed and levied so long as ownership of or an easement in their private seawall has not been acquired by the County Commissioners. But it is quite another matter to resist the ad valorem tax merely because a direct benefit cannot be attributable to the imposition of the tax. In *Morton Salt Co. v. City of South Hutchinson* (C. A. 10, 1949), 177 F. 2d 889, the appellant protested payment of an ad valorem tax levied on all property in the City to pay for the cost of a city water system financed by a bond issue. Appellant argued it would receive no benefit because it had its own private water system and would not even be connected with the proposed city water supply. In denying relief to appellant, the Court pointed out that, although constitutional due process requires a municipality to give something for its exactions, it does not require *a quid pro quo*, i.e. a return in kind, or even an equivalent, for such exactions. The concurring opinion points out (p. 893) that "ad valorem taxes are not based on benefits but on value of taxable property. Their burdens are not necessarily in proportion to benefits and need not be to meet the constitutional test of validity. They must be uniform and must not be palpably arbitrary or discriminatory . . ." To the same effect is *Hydrocarbon Production Co. v. Valley Acres W. Dist.* (C. A. 5, 1953) 204 F. 2d 212, cert. denied 346 U. S. 825, 74 S. Ct. 44, 98 L. Ed. 350.

The benefit charges assessed against the lots in the District known as Tall Timbers on the Potomac cover only the cost of the erosion prevention works constructed (Record Extract 49-51), and Petitioners are not required to pay any portion of the cost of construction at this time. The mandate of the court below that they pay the ad valorem tax levied against their lots is dictated by the fact that the

ad valorem tax is uniformly applicable to all of the lots within the taxing district and such tax is based upon valuation and not upon benefits received. The levy of this ad valorem tax does not violate Article 15 of the Declaration of Rights of the Constitution of Maryland, providing that "all taxes . . . shall be uniform as to land within the taxing district, and uniform within the class or sub-class of improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy. . . ."

Petitioners do not challenge the fact that the issuance of bonds was for a public and not a private purpose. Undoubtedly, the prevention of erosion of abutting properties on the Potomac River was in the public interest. *McQuillin, Mun. Corp.* (3rd Ed.), Sec. 43.31. It was, therefore, within the constitutional power of the General Assembly of Maryland to have provided for an ad valorem tax in the erosion district to pay for the construction of the erosion prevention works, as well as the interest on the bonds and the maintenance and repair charges on the erosion prevention works. This method of taxation would have placed the burden of taxation uniformly on all taxpapers, as constitutionally required, but that burden would have been shared by taxpayers receiving no direct and immediate benefit from the project. Instead of following this course, the General Assembly of Maryland chose to place the heaviest tax burden on those who would receive direct benefits by providing for a benefit charge to cover the cost of the project. Thus, the method chosen is in favor of the ad valorem taxpayer, and he should not now be permitted to complain of the beneficence of the General Assembly in reducing his potential tax burden.

Finally, Petitioners have cited no authority which would require the interest on money borrowed for a public im-

provement to be included in the benefit charge and excluded from the computation of the ad valorem tax. It appears that the assessment may include interest but Respondents have been unable to find any mandatory authority to such effect. 63 *C. J. S., Mun. Corp.*, Sec. 1411(h), p. 1201.

It is evident that Petitioners received some benefit from the construction of the erosion prevention works in the District in which their lots are located, even though they owned their own seawall. This is so because the seawall belonging to the District is tied in on both sides of Petitioners' seawall and, thus, the river is prevented from encroaching around either end of Petitioners' seawall (Ex. 4, Record Extract 54-55; 20-21). Furthermore, jetties were constructed by the County Commissioners in front of the Petitioners' seawall in order to trap sand and protect the Petitioners' seawall (Record Extract 111-112).

III. Petitioners' final argument is that the equal protection clause of the 14th Amendment has been violated because two lots at the extreme southern end of the Tall Timbers subdivision were not included in the special Taxing District. These lots, shown as lots 49 and 50 (Ex. 4, Record Extract 54-55), were not included because at the time of the creation of the Taxing District the lots were protected by seawalls considered by the County Surveyor in 1951 to be adequate (Pet. 34; Record Extract 178; Ex. 4, Record Extract 54-55). The court below carefully examined the pertinent sections of the Act of 1953, c. 277 (Pet. 32) and concluded that the County Commissioners had ample authority under the Act to designate all or part of any recorded subdivision as the special Taxing District which should bear the benefit and ad valorem taxes authorized by the Act of the General Assembly. It is axiomatic that lands to be assessed may be determined either by the

legislature itself or the legislature may leave the classification to the determination of local political subdivisions. *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 S. Ct. 625, 45 L. Ed. 879 (1901); *Houck v. Little River Drainage Dist.*, 239 U. S. 254, 36 S. Ct. 58, 60 L. Ed. 266 (1915). Furthermore, there is no requirement, as Petitioners argue, that there must be a territorial uniformity in order to have compliance with the equal protection clause of the 14th Amendment. This Court has stated on several occasions that the requirement under the Amendment relates to equality between persons as such rather than between areas. *Salsburg v. Maryland*, 346 U. S. 545, 74 S. Ct. 280, 98 L. Ed. 281 (1954); *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989 (1879). More recently this Court has said in *Walters v. City of St. Louis*, 347 U. S. 231, 74 S. Ct. 505, 98 L. Ed. 660 (1954) at page 237 (U. S. Reports):

> ". . . Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. . . ."

Respondents submit that, in the enactment of Laws of Maryland 1957, c. 277, the General Assembly of Maryland followed the principles established by this Court with respect to the application of the equal protection clause of the 14th Amendment and that the County Commissioners, duly delegated to establish the special Taxing District, did not make any arbitrary, unreasonable or discriminatory classification in setting up the Taxing District. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369 (1896); *Wampler v. LeCompte*, 282 U. S. 172, 51 S. Ct. 92, 75 L. Ed. 276 (1930); *U. S. Mortgage Co. v. Matthews*,

293 U. S. [illegible] 55 S. Ct. 168, 79 L. Ed. 299 (1934); *Tatlebaum v. Pante. Mj . Co.*, 204 Md. 360, 104 A. 2d 813 (1954).

## CONCLUSION

The de[illegible]ion of the Court of Appeals of Maryland is correct, and it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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